is not one of partial performance like the former,[17] or that the equitable principle of avoiding forfeiture has been applied in one case but not the other.[18] A landlord dispossessing a tenant in default waives his right to the deposit except to the extent of the damages sustained before entry, since he has elected to use the remedy of re-entry instead.[19] The dispossessory proceedings cancel the lease and all obligations of both parties under it,[20] except those expressly provided to survive.[21] In the absence of such surviving obligations the breach by the tenant is complete and damages are fixed and definite at the time of the dispossession, and hence it is not a case in which the parties may liquidate the damages in advance.[22] This view was followed in the recent case of *Fleisher* v. *Friob* (N. Y. Sup. Ct. App. Term, 1916) 56 N. Y. L. J. 663, where a tenant who had been removed from the premises for non-payment of rent was allowed to recover a deposit placed with his landlords as security under the lease, deducting the rent due at the time of his removal. As the parties failed to provide that the covenant to pay rent should survive the termination of the lease in the event in which it took place, and as the deposit was made to secure the performance of a number of covenants differing radically in their nature and importance, the provision was held to be one for a penalty, despite the fact that the contract used the term "liquidated damages".

SALE OF ACCOUNTS RECEIVABLE WITH GUARANTY AT DISCOUNT AS USURY.—Usury is best defined as the taking of more interest for the use of money than the law allows.[1] Of course, then, there can be no usury where the transaction sought to be set aside was a *bona fide* sale and not a provision for a loan on the security of the property transferred as collateral.[2] In the main, the difference between these two transactions is that in the loan the title to the property is not conveyed, while in the sale it is;[3] in a loan on security there is always a

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[17]Chaude *v.* Shepherd (1890) 122 N. Y. 397, 25 N. E. 358. On the other hand, where the deposit is made as an advance payment on the rent, a tenant removed from the premises for his own default cannot recover it. Galbraith *v.* Wood (1914) 124 Minn. 210, 144 N. W. 945; but *cf.* Cunningham *v.* Stockton (1910) 81 Kan. 780, 106 Pac. 1057.

[18]Cunningham *v.* Stockton, *supra*; see D'Appuzo *v.* Albright (N. Y. City Ct. 1902) 76 N. Y. Supp. 654.

[19]It makes no difference whether the deposit is made as a penalty or as liquidated damages, since the landlord by entering avoids the contract and waives damages for its breach. Wilson *v.* Agnew (1913) 25 Colo. App. 109, 136 Pac. 96; see *contra,* Barrett *v.* Monro (1912) 69 Wash. 229, 124 Pac. 369.

[20]Wilson *v.* Agnew, *supra*; N. Y. Code Civ. Proc. § 2253.

[21]Anzalone *v.* Paskusz (1904) 96 App. Div. 188, 89 N. Y. Supp. 203. But the contract must state clearly that the obligation is to survive summary proceedings in dispossession as well as common law re-entry by ejectment. Michaels *v.* Fishel (1902) 169 N. Y. 381, 62 N. E. 425.

[22]Feinsot *v.* Burstein, *supra.*

[1]3 Parsons, Contracts (9th ed.) *107.

[2]Webb, Usury, 71; White *v.* Anderson (1912) 164 Mo. App. 132, 147 S. W. 1122.

[3]Eiland *v.* Radford (1845) 7 Ala. 724; Lee *v.* Kilburn (1855) 69 Mass. 594; *In re* Grand Union Co. (2 C. C. A. 1915) 219 Fed. 353.

debt, while in a sale no debt exists, and there is no absolute personal obligation to repay.[4] Thus the maker of a promissory note cannot "sell" it to another, because he is not transferring property which is in existence, but merely his promise to repay the money within the time specified.[5] Connected with this is the rule that if the promissory note, enforcible against the maker, be transferred without an indorsement, the transferee may take it at a discount which would greatly exceed the legal rate of interest.[6] The reason is that the transferor holds in his hands an existent chose in action or property, which he may sell at any price agreed on between the parties as its value.[7] The courts are at odds on the question which arises when the transferor or payee indorses the note.[8] The indorser, by his indorsement, promises to pay the money represented by the face of the note provided the maker does not pay. There is a great difference in the obligation of the indorser and that of the maker attempting to sell his own note; the indorser is transferring an existent chose in action or property with a guaranty of its value; the maker's promise is absolute, the indorser's, conditional.[9] According to the better view, the indorser may be held liable for the full value.[10]

In the recent case of *Mercantile Trust Co.* v. *Kastor* (Ill. 1916) 112 N. E. 988, the U. S. Kellastone Co. made an agreement with the Mercantile Trust Co. by which the latter "bought" certain accounts of the former. The "vendee" agreed to pay a certain amount on the face of the accounts immediately and the remainder on the payment of the accounts by the debtors,[11] the "vendor" guaranteeing the payment of the accounts at maturity. The defendant, Kastor, was sued on his guaranty of the performance of the agreement by the Kellastone Co. The court, two judges dissenting, decided the contract to be one of loan on the security of the accounts as collateral, and therefore usurious. The dominant factor in deciding whether the agreement is usurious is whether a loan or a sale was really in the minds of the parties.[12] The Kellastone Co. could have transferred the accounts

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[4]Williston, Sales, 530; Harrison *v.* Lee (1822) 11 Ky. *190; Conway's Ex'rs. *v.* Alexander (1812) 11 U. S. 218, 237.

[5]Zabriskie *v.* Spielman (1884) 46 N. J. L. 35; *cf.* Knights *v.* Putnam (1825) 20 Mass. 184; Sterling *v.* Gogebic Lumber Co. (1911) 165 Mich. 498, 131 N. W. 109; *contra,* Peoples Bank & Trust Co. *v.* Fenwick Sanitarium (1912) 130 La. 723, 58 So. 523.

[6]Romero *v.* Segura (1834) 7 La. 307; Sedbury *v.* Duffy (1912) 158 N. C. 432, 74 S. E. 355; *cf.* Edelstein *v.* Mechlowitz (1915) 92 Misc. 170, 155 N. Y. Supp. 258.

[7]3 Parsons, *op. cit.* *143; Woodall & Sons *v.* People's Nat. Bank (1907) 153 Ala. 576, 45 So. 190; Colehour *v.* State Savings Inst. (1878) 90 Ill. 152, 156.

[8]For the divergent views see 1 Daniel, Negotiable Instruments (6th ed.) § 762a *et seq.*; 3 Parsons, *op. cit.* *107 *et seq.*

[9]The indorsement does not necessarily import a loan. 3 Parsons, *op. cit.* *148. In Nichols *v.* Fearson (1833) 32 U. S. *103, the transaction was regarded as analogous to a contract of bargain and sale with a warranty of soundness.

[10]See note 8, *supra.*

[11]That the consideration is contingent does not necessarily prevent the transaction from being a sale. See Reeves & Co. *v.* Sebern (1864) 16 Iowa, 234.

[12]3 Parsons, *op. cit.* *110.

receivable to the plaintiff at any agreed price, provided the transfer were a *bona fide* sale.[13] The vendor's agreement to repay any accounts at maturity may be considered in the nature of a guaranty or conditional promise, thus placing the case on an analogy to the negotiable instrument cases mentioned above.[14] The Kellastone Co. was not merely selling its promise to repay the money, but transferring valid existing choses in action with an agreement that they should be paid in case of default by the primary debtors.[15] The court seems to have been in error in regarding the Kellastone Co.'s guaranty of the accounts as such forceful evidence of a loan.[16] Since where there is any doubt of the validity of a contract, it is presumptively valid,[17] and a sale of negotiable instrument with an indorsement may be made in Illinois,[18] the dissenting opinion, written by Chief Justice Farmer, would seem to be preferable. Ultimately, of course, the question is purely one of fact.

RIGHT OF SUBROGATION AS BETWEEN INSURER AND CARRIER.—It is settled law in practically every jurisdiction in this country that, when both the underwriter and some third person become liable to the assured for the loss of his property, he may recover against one or the other, or both, but he may not retain both satisfactions,[1] on the ground that it would be sanctioning gaming contracts to allow the assured to recover twice for the same loss,[2] whereas insurance contracts are legitimate only for the purpose of indemnity against loss.[3] Historically, however, a wager policy is a policy on property in which the assured has no insurable interest, and the presence of such an interest

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[13] Dickson *v.* City of St. Paul (1908) 105 Minn. 165, 117 N. W. 426; see note 7, *supra.*

[14] *Cf.* 1 Daniel, *op. cit.* § 767 *et seq.*; Nichols *v.* Fearson, *supra.*

[15] The Illinois rule is that the note itself is not usurious in the case of a discount at higher than the legal rate of interest, Colehour *v.* State Savings Inst., *supra,* but the indorsee may only recover against the indorser the amount he has advanced. Raplee *v.* Morgan (1840) 3 Ill. 561. This was the rule in Connecticut, New York and Maine. See Belden *v.* Lamb (1846) 17 Conn. 441; Rapelye *v.* Anderson (N. Y. 1842) 4 Hill, 472; Lane *v.* Stewart (1841) 20 Me. 98. This rule has probably been changed by the Negotiable Instruments Law, § 96 [N. Y. § 167]; Norton, Bills & Notes (4th ed.) 316 n.; see also § 116 [N. Y. § 187].

[16] The cases cited by the court in its opinion seem to be distinguishable, in that they all contain absolute agreements to repurchase the accounts in default at maturity.

[17] United States *v.* Central Pac. R. R. (1886) 118 U. S. 235, 6 Sup. Ct. 1038. The Usury Statutes are penal and should be construed strictly. 3 Parsons, *op. cit.* *148.

[18] See note 15, *supra.*

[1] Chicago etc. R. R. *v.* Pullman So. Car. Co. (1891) 139 U. S. 79, 11 Sup. Ct. 490; *cf.* Excelsior Fire Ins. Co. *v.* Royal Ins. Co. (1873) 55 N. Y. 343; Nelson *v.* Bound etc. Fire Ins. Co. (1887) 43 N. J. Eq. 256, 11 Atl. 681.

[2] Honore *v.* Lamar Fire Ins. Co. (1869) 51 Ill. 409; Nelson *v.* Bound etc. Fire Ins. Co., *supra*; see *contra,* King *v.* State etc. Ins. Co. (1851) 61 Mass. 1.

[3] Richards, Insurance (3rd ed.) § 24; see 12 Columbia Law Rev. 631.